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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 75-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS, *Petitioners,*

vs.

ANTHONY G. BICA and JUAN SILVA, *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Second Appellate District

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Second Appellate District

QUESTION PRESENTED

Is Section 2805 of the California Labor Code an unconstitutional attempt to encroach upon the Federal scheme of immigration?

STATEMENT OF THE CASE

Petitioner sought injunctive relief and damages pursuant to Section 2805, California Labor Code.

A demurrer without leave to amend was sustained on February 14, 1973. The Court of Appeals, Second Appellate District, State of California, affirmed on July 26, 1973. Petition for hearing by the California Supreme Court was denied on October 24, 1974.

SUMMARY OF ARGUMENT

States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation. Immigration is a field which is reserved to the Federal government. The Federal government has completely occupied this field by passage of the Immigration and Nationality Act of 1952, as amended in 1965. Section 2805 of the California Labor Code is in direct conflict with 8 USC §1324(a), Immigration and Nationality Act of 1952, as amended in 1965.

ARGUMENT

I.

STATE LAWS WHICH ATTEMPT TO REGULATE IMMIGRATION ARE NULL AND VOID UNDER THE DOCTRINE OF FEDERAL PRE-EMPTION.

A. States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation.

The United States Constitution provides, in Article I, Section 8, clause 4:

> "The Congress shall have the Power . . . to establish a uniform rule of Naturalization . . ."

This power is exclusive.

There is no direct mandate in the United States Constitution dealing with the power to regulate immigration. The federal government did not adopt immigration restrictions for its first 100 years. However, whenever states attempted to control immigration, their attempts were struck down under the theory that the regulation of immigration concerned foreign commerce and this was an area exclusively that of the federal government. *The Passenger Cases (Smith v. Turner)* 48 U.S. 283, 12 L.Ed. 702 (1849); *Henderson v. Mayor of New York,* 92 U.S. 259, 23 L.Ed. 543 (1875); *Chy Lung v. Freeman,* 92 U.S. 75, 23 L.Ed. 550 (1875); Gordon and Rosenfield, Immigration Law and Procedure, Vol. 1, pages 1-27.

In subsequent decisions this Court enlarged the scope of federal power in this area, and stated that the power to regulate immigration was implied from two sources. The first source of implied power is from the specific directives in the Constitution to regulate foreign commerce, declare war, make treaties, establish a uniform rule of Naturalization, prohibit the importation of persons, and to make all necessary and proper laws. The second source of implied powers to regulate immigration is as an incident of national sovereignty without any specific grant in the Constitution. *Chae Chan Ping v. U.S.,* 130 U.S. 581, 32 L.Ed. 1068 (1889); *Ekiu v. U.S.,* 142 U.S. 651, 35 L.Ed. 1146 (1892). In *Ekiu v. U.S.,* the Court stated at page 659:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent sovereignty, and essential to self preserva-

tion to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

Section 2805 of the California Labor Code,[1] if allowed to stand, will regulate immigration. If enforced, it will result in the massive shifts of "aliens not entitled to lawful residence" across the international border with Mexico or the state borders of Oregon, Nevada, and Arizona.[2]

This is undoubtedly the purpose of the statute. However laudible that purpose may be, it is a regulation of immigration and not permitted. This Court, in *Truax v. Raich,* 239 U.S. 33, 60 L.Ed. 131 (1915) held that an Arizona law, which effectively deterred interstate migration of aliens by imposing a substantial limitation on employment opportunities interfered with the power of the federal government to

[1]Section 2805 of the California Labor Code reads as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

[2]It is also possible that those who will be terminated from employment would go on the general welfare rolls. The decision of *Graham v. Richardson,* 403 U.S. 365, 29 L.Ed.2d 534 (1971), invalidated state rules either denying aliens general assistance or imposing residence requirements on aliens. It is unclear whether states can deny assistance to aliens not entitled to lawful residence.

admit persons to this country under acts of Congress. At page 42, 239 U.S., the Court states:

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."

Labor Code Section 2805 likewise seeks to control immigration into the State of California and the migration of aliens interstate by seeking to abolish their employment opportunities.[3]

B. Even assuming that states could legislate in the field of immigration and naturalization absent federal legislation, the Immigration and Nationality Act of 1952, as amended in 1965, effectively precludes any state legislation.

Pennsylvania v. Nelson, 350 U.S. 497, 100 L.Ed. 640 (1955), declared the test to be used to determine whether the federal government has so occupied a field that a state cannot legislate in that area.

"First, the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to supplant it." Page 502.

"Second, the federal statutes touch a field in which the federal interest is so dominant that the

[3]Petitioners may contend that the situation is unlike *Truax v. Raich* because Section 2805 only deals with aliens not entitled to lawful residence while *Truax* applied to aliens otherwise lawfully admitted into the United States. Analytically this is incorrect, because there may be some time, either at the present or in the future, when employment of aliens not entitled to lawful residence would not have an adverse effect on lawful resident workers. If that situation arose, then it would not be a violation of Section 2805 to hire an alien not entitled to lawful residence and California would actually be encouraging the entry of aliens not entitled to lawful residence. This again amounts to an attempt to control immigration.

federal system must be assumed to preclude enforcement of state laws on the same subject." Page 504.

"Third, enforcement of State Sedition Act presents a serious danger of conflict with the administration of the federal program." Page 505.

In *Pennsylvania v. Nelson,* supra, the State of Pennsylvania had enacted the Pennsylvania Sedition Act. This Court held that the federal government, by enacting the Smith Act in 1940, and amending it in 1948, invalidated the state law under the doctrine of federal suppression.

It must be conceded that Congress has enacted a comprehensive scheme for immigration and nationality. The Immigration and Nationality Act of 1952 is found at 8 USC § 1101 et seq. It was passed over President Truman's veto on January 27, 1952. U.S. Code, Cong. & Admin. News, 1952, page 276. The volume and subject matter alone indicate the comprehensiveness of the Act. Congress thought that it was enacting a comprehensive law as the committee states at page 1653 U.S. Code, Cong. & Admin. News, 1952:

"Purpose of the Bill

The purpose of the bill is to enact a comprehensive, revised immigration, naturalization and nationality code."

By virtue of the comprehensive legislation in this area, the State of California is precluded from also legislating. Clearly the tests of *Nelson* are met, and Section 2805 must fall. First, the scheme of federal

regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Second, as was shown previously in Part A of this brief, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of same laws on the same subject. Third, the enforcement of the state act presents a serious danger of conflict with the administration of the federal program as it could drive masses of people to other states. As Justice Holmes said in *Charleston & W. C. R. Co. v. Varnville Furniture Co.,* 237 U.S. 596, 59 L.Ed. 1137 (1914):

"When Congress has taken a particular subject matter in hand, coincidence is as ineffective as opposition, and the state law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

C. Section 2805 of the California Labor Code is unconstitutional because it encroaches on a particular aspect of immigration and naturalization upon which Congress has spoken.

Section 2805 should fall because it is an attempt to regulate immigration, *Henderson v. Mayor of New York,* supra, and because Congress has completely occupied the field of immigration, *Pennsylvania v. Nelson,* supra.

It must also fall under the theory of *Hines v. Davidowitz,* 312 U.S. 52, 85 L.Ed. 581 (1940). In *Hines,* supra, the State of Pennsylvania passed an alien registration law which required all aliens to register and carry alien identification cards. The federal government, in 1940, passed the Alien Registra-

tion Act. Davidowitz, an alien, filed an action to declare the Pennsylvania Act unconstitutional. He advanced two theories, summarized at 312 U.S. 59, 85 L.Ed. 582. First, the Pennsylvania Act encroached on a field reserved for the federal government. Second, it was a denial of equal protection. Justice Black, writing for the majority, restricted the ruling to: "Whether, by adoption of a comprehensive, integrated scheme for regulation of aliens, Congress has precluded state action." This was resolved in favor of Davidowitz, *Hines v. Davidowitz,* supra, page 62 and 63:

> "That the supremacy of national power in the general field of foreign affairs, including power of immigration, naturalization, and deportation, is made clear by the Constitution, was pointed out by the authors of the Federalist in 1787 (fn omitted). When the national government, by treaty or statute has established rules and regulations touching the rights, privileges, obligations, or burdens of aliens as such, the treaty or the statute is the supreme law of the land. No state can add to or take from the force in effect of such treaty or statute. . . ."

The opinion continues, at page 66 and 67:

> "And where the Federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations (fn omitted)."

All that need be added to the present case is the substitution in the above statement of the word "employment" for the word "registration."

Petitioner maintains that Section 2805 is consistent with the Federal scheme of immigration. As such, Petitioner states that Section 2805 reinforces the policy expressed in 8 USC § 1182(a)(14), (applicants for permanent admission), and 8 USC § 1101(a)(15)(H)(ii) (issuing of labor certificates to temporary workers who are non-immigrants and perform labor if unemployed workers in this country cannot be found).

It is obvious, however, that Section 2805 has nothing to do with either temporary employment of non-immigrants without visas or permanent admission of immigrants. It is directed solely at employers of "aliens not entitled to lawful residence." This area has also been specifically dealt with by Congress in 8 USC § 1324(a) which provides a comprehensive scheme for defining the crimes of transporting or harboring, or inducing entry of any alien not lawfully entitled to enter or reside within the United States. The statute itself emphasized that employment was not a violation of the Act. *"Provided, however,* etc." The legislative history is not silent on this matter either. U.S. Code, Cong. & Admin. News, 1952, page 1724:

> "The committee wishes to state that employment (including the usual and normal practice incident to employment) shall not be deemed to constitute harboring, and, with this reservation, the committee strongly recommends the enactment of Section 274 [1324(a)] as amended."

Section 1324(a) was the subject of concern when the Immigration and Nationality Act of 1952 was under consideration. This was necessitated by the decision in *United States v. Evans,* 333 U.S. 483, 92 L.Ed. 823 (1948) which held that the penalty provisions under the Immigration Act of 1917 were inadequate to provide a penalty for concealing or harboring aliens unlawfully in the United States. Section 1324 (a) was rewritten so that concealing or harboring were violations of the Act. It is thus clear that Congress addressed itself squarely on the issue of employment of aliens not entitled to lawful residence and declared that it was not unlawful.

Petitioner places much reliance on the amendments to the Act which were made in 1965. However, those amendments address themselves to the issuing of visas to aliens seeking employment. 8 USC § 1182(a)(14) was amended to put the burden on the alien to establish that there were not sufficient workers in the United States at the alien's destination who are able, willing and qualified to perform the skilled or unskilled labor and that his employment would not adversely affect wages and working conditions of U.S. citizens similarly employed. U.S. Code, Cong. & Admin. News, 1965, pages 3333 and 3334. At page 3329 the Committee's report, Item No. 7 states:

> "7. Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market are strengthened."

This, of course, has nothing to do with employment of aliens not entitled to lawful residence. Had the petitioner charged that the Secretary of State was issuing visas contrary to the provisions of 8 USC § 1182 (a)(14) or labor certificates pursuant to § 1101(a) (15)(H)(ii) then he could seek relief in Federal District Court.

Petitioner would have the Court believe that by amending 8 USC § 1182(a)(14), Congress was inviting the individual states to pass laws which would restrict the employment of aliens not entitled to lawful residence in the United States. There is a major problem with such a theory. Congress would have had to address itself to the penalty provision chapter of the Immigration Title of the Act rather than the admission qualifications chapter. It then would have had to delete the employment exemption and/or create a new crime, namely that of employing aliens not entitled to lawful residence. It did neither of these. It did examine the penalty provision chapter and amended 1322(a) to bring it into conformity with § 1182(a)(14). U.S. Code, Cong. & Admin. News, 1955, page 3344 (Section 18).

Congress is not ignorant of the problem of employment of aliens not entitled to lawful residence. On May 3, 1973, the House of Representatives passed H.R. 982.[4] The section of concern for this case of H.R. 982 is Section 2. The bill amends 8 USC § 1324 (a) to provide a penalty for knowingly employing any alien not lawfully admitted to the United States for permanent residence. It involves a three-step proce-

[4]H.R. 982 has been reintroduced in this session of Congress again as H.R. 982.

dure in which an employer is first cited, then fined civilly, and finally charged with a misdemeanor on the third offense. (H.R. 982, pages 3, 4 and 5).

Some relevant portions of the committee (judiciary) report (93-108 to accompany H.R. 982, 93rd Congress, 1st Session) include:

> "Since under present law there is no prohibition on the employment of illegal aliens . . ." page 6.

> "The original legislation before the Committee (H.R. 2328, 92nd Congress, which was introduced at the request of the administration), would have provided a $1,000 fine and/or one year imprisonment for a first violation. The Committee reviewed this approach as too severe, and recognized the possibility of employment discrimination if criminal penalties were initially imposed. Consequently the Committee rejected this approach and instead, substituted the graduated three-step procedure for the imposition of sanctions." Pages 12 and 13.

"Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appeared to be condoned by the existing proviso in Section 274(a)(4) [1324 (a)(4)] that employment shall not be deemed to constitute the harboring of illegal aliens." Page 15.

"Moreover, despite the fact that eight out of ten illegal aliens apprehended are Mexican natives, the problem is no longer restricted to the agricultural and border area of the Southwestern United States. Increasing, illegal aliens travel,

> or arrange to be transported, to all of the metropolitan areas in the United States, where they can obtain higher-paying jobs in industry and, at the same time, more easily escape detection by Immigration authorities." Page 5.

It is clear that Congress has carefully considered the problem of employment of aliens not entitled to lawful residence. It is also clear that Congress has made the express determination that such employment is not unlawful. It may decide to alter this position in the future, but that is a matter strictly within its jurisdiction, and not that of the individual States. Section 2805 of the Labor Code is not an aid to the federal scheme, but is in direct conflict with it and is invalid.

Petitioners' reliance on *Kewanee Oil Company v. Bicron Corp.*, ... U.S. ....., 40 L.Ed.2d 315 (1974) is not well placed. The Court in *Kewanee,* supra, held that:

> ". . . just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries." Page 324.

This was based on *Goldstein v. California,* 412 U.S. 546, 37 L.Ed.2d 163 (1973) which held that the clause 8 (Article I, § 8), grant of power to Congress to protect intellectual property was not exclusive in that, at least in the case of writings, the States were not forbidden from encouraging and protecting efforts of those within their borders by appropriate legislation.

Immigration and foreign affairs can hardly be classified as intellectual property. Respondent has shown that immigration is not a subject of concurrent jurisdiction, but is exclusive. Respondent has also shown that the federal government has completely occupied this field. Respondent has also shown that the underlying policy of § 2805 "clashes with the objectives" of 8 USC § 1324 (a). The objective of § 1324 (a) is to exempt employers from criminal liability for employing aliens not entitled to lawful residence. The objective of Section 2805 is to attach civil and criminal liability for employing aliens not entitled to lawful residence.

Kewanee, supra, is also inapplicable to this case because the very foundation of *Kewanee* is:

> ". . . the great diversity of interests in our Nation—the essentially non-uniform character of the appreciation of intellectual achievements in the various States." Page 324.

If there is one subject which does not lend itself to diverse treatment by the various States, it is that of immigration and foreign affairs. *Hines v. Davidowitz,* supra; *Chae Chan Ping v. U.S.,* supra, at page 606:

> "For local interests, the several States of the Union exists; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

CONCLUSION

In summary, it is respondents' contention that Section 2805 of the California Labor Code is unconstitutional under three separate and distinct theories of federal pre-emption.

First, it attempts to regulate immigration and is unconstitutional because that is a subject matter over which the federal government has exclusive jurisdiction. Under this theory, even if Congress had not legislated, Section 2805 would be unconstitutional.

Second, assuming arguendo, that the States had concurrent jurisdiction over immigration and nationality, Section 2805 is unconstitutional because Congress has enacted a comprehensive scheme and left no room for the individual States to legislate.

Third, Congress has addressed itself to the specific area that Section 2805 does, namely penalties for the employment of aliens not entitled to lawful residence. It has expressly stated that such employment is not unlawful. Section 2805 is in direct conflict with this policy and is invalid.

Respectfully submitted,
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March 21, 1975.

(Appendix Follows)

APPENDIX

Appendix

1. Section 2805 of the California Labor Code reads as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

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2. 8 U.S.C. 1182(a)(14) provided (1952-1965) for the exclusion of admission the following class of aliens: "Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which alien is destined) to perform such skilled or unskilled labor or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed."

3. 8 USC 1182(a)(14) provides (1965-present) for the exclusion of admission the following class of aliens: "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . ."

---

4. 8 USC 1324 "(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this act or any other law relating to the im-

migration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

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5. H.R. 982. Sec. 2. Section 274 of the Immigration and Nationality Act (8 USC 1324) is amended by deleting the proviso in paragraph 4 of subsection (a) and by redesignating subsection (b) as subsection (c) and adding new subsections (b), (c), and (d) to read as follows:

"(b)(1) It shall be unlawful for any employer or any person acting as an agent for such an employer, or any person who for a fee, refers an alien for employment by such an employer, knowingly to employ, continue to employ, or refer for employment any alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General: *Provided,* That an employer, referrer, or agent shall not be deemed to have violated this subsection if he has made a bona fide inquiry whether a person hereafter employed or referred by him is a citizen or an alien, and if an alien, whether he is lawfully admitted to the United States for permanent residence or is authorized by the At-

torney General to accept employment: *Provided further,* That evidence establishing that the employer, referrer, or agent has obtained from the person employed or referred by him a signed statement in writing in conformity with regulations which shall be prescribed by the Attorney General that such person is a citizen of the United States or that such person is an alien lawfully admitted for permanent residence or is an alien authorized by the Attorney General to accept employment, shall be deemed prima facie proof that such employer, agent or referrer has made a bona fide inquiry as provided in this paragraph. The Attorney General of the United States shall prepare forms for the use of employers, agents, and referrers in obtaining such written statements and shall furnish such forms to employers, agents, and referrers upon request.

"(2) If, on evidence or information he deems persuasive, the Attorney General concludes that an employer, agent, or referrer has violated the provisions of paragraph (1), the Attorney General shall serve a citation on the employer, agent, or referrer informing him of such apparent violation.

"(3) If, in a proceeding initiated within two years after the service of such citation, the Attorney General finds that any employer, agent, or referrer upon whom such citation has been served has thereafter violated the provisions of paragraph (1), the Attorney General shall assess a penalty of not more than $500 for each alien in respect to whom any violation of paragraph (1) is found to have occurred.

"(4) A civil penalty shall be assessed by the Attorney General only after the person charged with a violation under paragraph (3) has been given an opportunity for a hearing and the Attorney General has determined that a violation did occur, and the amount of the penalty which is warranted. The hearing shall be of record and conducted before an immigration officer designated by the Attorney General, individually or by regulation and the proceedings shall be conducted in accordance with the requirements of title 5, section 554 of the United States Code.

"(5) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Attorney General shall file a suit to collect the amount in any appropriate district court of the United States. In any such suit or in any other suit seeking to review the Attorney General's determination, the suit shall be determined solely upon the administrative record upon which the civil penalty was assessed and the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

"(c) Any employer or person who has been assessed a civil penalty under subsection (b)(3) which has become final and thereafter violates subsection (b)(1) shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, for each alien in respect to whom any violation of this subsection occurs."